IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 0061 of 2019
[In the High Court at Suva Case No. HAC 116 of 2016S]

BETWEEN	:	**ILISONI TIKO**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, JA**
Counsel	:	**Mr. T. Lee for the Appellant**
	:	**Mr. Y. Prasad for the Respondent**
Date of Hearing	:	**05 February 2021**
Date of Ruling	:	**08 February 2021**

RULING

[1] The appellant (with 04 others) had been indicted in the High Court of Suva on one count of rape contrary to section 207(1) and (2) (a) and (3) of the Crimes Act, 2009 committed in Nausori, in the Central Division between 01 November 2015 and 31 November 2015.

[2] The count against the appellant in the information read as follows.

'Third Count

(Representative Count)

Statement of Offence

RAPE: *Contrary to Section 207 (1) and (2) (a) and (3) of the Crime Act 2009.*

Particulars of Offence

> ***ILISONI TIKO*** *between the 1st day of November 2015 and 31st day of November 2015, in Nausori, in the Central Division, penetrated the anus of* ***W. W*** *who is a child under the age of 13 years old, with his penis.*

[3] The facts of the case had been summarized by the trial judge in the sentencing order as follows.

> *'2. ……. The male complainant (PW1) was 12 years old at the time of the offences. Ilisoni Tiko was 39 years old and single. Adriu Rogomuri was 35 years old, married with a young daughter. Epineri Saurara was 52 years, married with four children. In count no. 1, Ilisoni Tiko enticed PW1 to his village kitchen and thereafter forcefully sodomised him. In count no. 2, Adriu Rogomuri enticed PW1 to near his pig pen and thereafter forcefully sodomised him. In count no. 3, while PW1 was in Bu Tere's house, Epineri Saurara forcefully sodomised him. The complainant was a 12 year old child at the time, and was thus incapable of giving his consent to the above. Further, the accused were deemed in law to know that PW1 was incapable of giving his consent to the incidents mentioned above. All the accused were PW1's uncle. They all lived in the same village or near to PW1's residence.'*

[4] At the end of the summing-up on 06 November 2017 the assessors had unanimously opined that the appellant was guilty of the charge. The learned trial judge had agreed with the unanimous opinion of the assessors in his judgment delivered on the same day, convicted the appellant and sentenced him on 07 November 2017 to 14 years of imprisonment with a non-parole period of 12 years.

[5] The appellant had filed an untimely notice of appeal on 01 April 2019 against conviction which was out of time by about 01 year, 03 months and 03 weeks. The Legal Aid Commission had filed a notice of motion seeking extension of time, amended grounds of appeal against conviction and sentence, affidavit and written submissions on behalf of the appellant on 27 July 2020. Thus the appellant's sentence appeal is out of time by 02 years, 07 months and 20 days. The state had tendered its written submissions on 26 November 2020.

[6] Presently, guidance for the determination of an application for extension of time within which an application for leave to appeal may be filed, is given in the decisions in **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4, **Kumar v State**; **Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17

[7] In ***Kumar*** the Supreme Court held

> *'[4] Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:*
>
> *(i) The reason for the failure to file within time.*
> *(ii) The length of the delay.*
> *(iii) Whether there is a ground of merit justifying the appellate court's consideration.*
> *(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
> *(v) If time is enlarged, will the Respondent be unfairly prejudiced?*

[8] ***Rasaku*** the Supreme Court further held

> *'These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court.'*

[9] The remarks of Sundaresh Menon JC in **Lim Hong Kheng v Public Prosecutor** [2006] SGHC 100 shed some more light as to how the appellate court would look at an application for extension of time to appeal.

> '*(a)……..*
>
> *(b) In particular, I should apply my mind to the length of the delay, the sufficiency of any explanation given in respect of the delay and the prospects in the appeal.*
>
> *(c) These factors are not to be considered and evaluated in a mechanistic way or as though they are necessarily of equal or of any particular importance relative to one another in every case. Nor should it be expected that each of these factors will be considered in exactly the same manner in all cases.*
>
> *(d) Generally, where the delay is minimal or there is a compelling explanation for a delay, it may be appropriate to subject the prospects in the appeal to rather less scrutiny than would be appropriate in cases of inordinate delay or delay that has not been entirely satisfactorily explained.*
>
> *(e) It would seldom, if ever, be appropriate to ignore any of these factors because that would undermine the principles that a party in breach of these rules has no automatic entitlement to an extension and that the rules and statutes are expected to be adhered to. It is only in the deserving cases, where*

it is necessary to enable substantial justice to be done, that the breach will be excused.'

[10] Sundaresh Menon JC also observed

> *'27…… It virtually goes without saying that the procedural rules and timelines set out in the relevant rules or statutes are there to be obeyed. These rules and timetables have been provided for very good reasons but they are there to serve the ends of justice and not to frustrate them. To ensure that justice is done in each case, a measure of flexibility is provided so that transgressions can be excused in appropriate cases. It is equally clear that a party seeking the court's indulgence to excuse a breach must put forward sufficient material upon which the court may act. No party in breach of such rules has an entitlement to an extension of time.'*

[11] Under the third and fourth factors in ***Kumar,*** test for enlargement of time now is **'real prospect of success'.** In **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019) the Court of Appeal said

> *'[23] In my view, therefore, the threshold for enlargement of time should logically be higher than that of leave to appeal and in order to obtain enlargement or extension of time the appellant must satisfy this court that his appeal not only has 'merits' and would probably succeed but also has a* ***'real prospect of success'*** *(see* ***R v Miller*** *[2002] QCA 56 (1 March 2002) on any of the grounds of appeal……'*

Length of delay

[12] As already stated the delay in conviction appeal is 01 year, 03 months and 03 weeks and in sentence appeal the delay is 02 years, 07 months and 20 days both of which are very substantial.

[13] In **Nawalu v State** [2013] FJSC 11; CAV0012.12 (28 August 2013) the Supreme Court said that for an incarcerated unrepresented appellant up to 03 months might persuade a court to consider granting leave if other factors are in his or her favour and observed.

> *'In* ***Julien Miller v The State*** *AAU0076/07 (23rd October 2007) Byrne J considered 3 months in a criminal matter a delay period which could be considered reasonable to justify the court granting leave.'*

[14] However, I also wish to reiterate the comments of Byrne J, in **Julien Miller v The State** AAU0076/07 (23 October 2007) that

> *'... that the Courts have said time and again that the rules of time limits must be obeyed, otherwise the lists of the Courts would be in a state of chaos. The law expects litigants and would-be appellants to exercise their rights promptly and certainly, as far as notices of appeal are concerned within the time prescribed by the relevant legislation.'*

Reasons for the delay

[15] The appellant's excuse for the delay is that he was informed by his trial counsel that he would file appeal papers but he had failed to do so. Then, he sought the assistance from his inmates and filed his appeal. He has still not explained as to why he had failed to appeal his sentence in the first instance. In any event, there is nothing to substantiate that he had instructed his trial counsel to appeal his conviction and sentence and in that event there is no reason for him to have waited for so long to realize that no appeal had been filed by his trial lawyer. His explanation is unconvincing and unacceptable.

Merits of the appeal

[16] In **State v Ramesh Patel** (AAU 2 of 2002: 15 November 2002) this Court, when the delay was some 26 months, stated (quoted in **Waqa v State** [2013] FJCA 2; AAU62.2011 (18 January 2013) that delay alone will not decide the matter of extension of time and the court would consider the merits as well.

> *"We have reached the conclusion that despite the excessive and unexplained delay, the strength of the grounds of appeal and the absence of prejudice are such that it is in the interests of justice that leave be granted to the applicant."*

[17] Therefore, I would proceed to consider the third and fourth factors in ***Kumar*** regarding the merits of the appeal as well in order to consider whether despite the very substantial delay and the absence of a convincing explanation, the prospects of his appeal would warrant granting enlargement of time.

[18] Further guidelines to be followed for leave to appeal when a sentence is challenged in appeal are well settled (vide **Naisua v State** CAV0010 of 2013: 20 November 2013 [2013] FJSC 14; **House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015 and **Chirk King Yam v The**

State Criminal Appeal No.AAU0095 of 2011). The test for leave to appeal is not whether the sentence is wrong in law but whether the grounds of appeal against sentence are arguable points under the four principles of ***Kim Nam Bae's*** case. **For a ground of appeal untimely preferred against sentence to be considered arguable there must be a real prospect of its success in appeal**. The aforesaid guidelines are as follows.

> *(i) Acted upon a wrong principle;*
> *(ii) Allowed extraneous or irrelevant matters to guide or affect him;*
> *(iii) Mistook the facts;*
> *(iv) Failed to take into account some relevant consideration.*

[19] Grounds of appeal urged on behalf of the appellant are as follows.

> ***Conviction***
>
> *1. The Learned Trial Judge erred in law and in facts by not directing the assessors and himself in assessing the delay in the complaint.*
>
> *2. The Learned Trial Judge erred in law and in facts by directing the assessors to consider the finding of the doctor is consistent with the history relayed by the complainant, without cautioning the assessors not to consider what is relayed by the complainant to the doctor as the truth in light of the hearsay rule, therefore such direction has misguided the assessors to have placed more weight on the medical evidence in favour of the complainant's account of the allegation against the Appellant.*
>
> *3. The Learned Trial Judge erred in law and in facts by misdirecting the assessors that if they accepted the doctor's medical finding of the complainant's anal injury, it merely strengthens the complainant's verbal evidence, therefore, such direction has misguided the assessors to have placed more weight on the medical evidence in favour of the complainant's account of the allegation against the Appellant.*
>
> *4. That Learned Trial Judge erred in law and in facts in not directing the assessors in a balance, fair and objective manner of the Appellant's case.*
>
> *5. The Learned Trial Judge erred in law and in fact by directing the assessors that a prima facia case is made up against the Appellant.*
>
> ***Sentence***
>
> *6. The learned trial judge erred in principle by considering extraneous factors in the aggravating factors thereby enhancing the appellant's sentence.*

01st grounds of appeal

[20] The appellant complains of lack of direction to the assessors on delayed reporting in the summing-up. It appears that the reporting of the incidents of rape had been done in March 2016 after 03-04 months of the appellant's alleged act of anal penetration of the victim. There is no specific direction on the issue of delay in the summing-up. Nor does it appear that the appellant had challenged the victim's evidence on the basis of delay and demanded an explanation as to why he had not reported the incident promptly. This is a case of series of anal rapes that had happened over a period of time involving several accused all of whom were related to the victim in a village environment. It does not appear to have been the appellant's position that the victim had fabricated or embellished or exaggerated the allegation of rape.

[21] The issue of delay was dealt with by the Court of Appeal in **State v Serelevu** [2018] FJCA 163; AAU141.2014 (4 October 2018) on how to deal with a delayed complaint where it was held:

> **'**[24] In law the test to be applied on the issue of the delay in making a complaint is described as "the totality of circumstances test". In the case in the United States, in **Tuyford** 186, N.W. 2d at 548 it was decided that:-
>
> > *'The mere lapse of time occurring after the injury and the time of the complaint is not the test of the admissibility of evidence. The rule requires that the complaint should be made within a reasonable time. The surrounding circumstances should be taken into consideration in determining what would be a reasonable time in any particular case. By applying the totality of circumstances test, what should be examined is whether the complaint was made at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay.'*

[22] To decide whether the complaint was made at the first suitable opportunity within a reasonable time or whether there was an explanation for the delay, it should have been a live issue at the trial. If the appellant had not made it a live issue, in my view, he cannot simply raise it as an appeal point on the basis that the trial judge had failed to direct the assessors on delay in which event the counsel for the appellant should have sought a redirection on the lines suggested in ***Serelevu*** on delayed reporting as held in **Tuwai v State** [2016] FJSC35 (26 August 2016) and **Alfaaz v State** [2018] FJCA19;

AAU0030 of 2014 (08 March 2018) and **Alfaaz v State** [2018] FJSC 17; CAV 0009 of 2018 (30 August 2018).

[23] I dealt with the issue of delay particularly when child rape is involved in **Vulaono v State** [2020] FJCA 209; AAU0004.2018 (28 October 2020) in some detail where I *inter alia* quoted from **Tulshidas Kanolkar vs The State of Goa** Appeal (crl.) 298 of 2003 (27/10/2003) of the Supreme Court of India as follows on the effect of delay in reporting.

> *'In any event, delay per se is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging first information report cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the Court is to only see whether it is satisfactory or not. In a case if the prosecution fails to satisfactory explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of prosecution case.'*

[24] It appears that the appellant had not sought to cast any doubt on the credibility of the victim's testimony at the trial on the basis of belated reporting. In the circumstances, I do not think that this ground of appeal has a real prospect of success.

02nd ground of appeal

[25] The appellant criticizes the trial judge's direction on medical evidence at paragraph 42 of the summing-up on the basis that he had not cautioned the assessors on the hearsay nature of his evidence on the identity of the appellant contained in the history given by the victim. The trial judge had left it to the assessors to treat the medical evidence where the doctor had observed a small laceration on anal mucosa at 6 o'clock position of the victim to be consistent with the history of anal penetration, as a matter for them to decide and stated that if they were to accept it that evidence supported the victim's evidence against the appellant as well. Further the trial judge had indicated to the assessors that the victim had mentioned to the doctor that the appellant and two other accused had performed anal sex on him. It is not clear that the prosecution had relied on the history to establish or at least as evidence of consistency of the victim's

testimony of the identity of the appellant. It also cannot be ascertained whether the prosecution had elicited evidence from the victim of what he had told the doctor in terms of the identities of the appellant and two other accused.

[26] Had the victim testified to what he had told the doctor then the impugned evidence by the doctor would not be hearsay evidence. Even otherwise, as long as the prosecution had not relied on the truth of what the victim had told the doctor on the identity of the appellant but only as part of the victim's narrative *i.e.* to show that the fact that the victim had come out with the appellant's name, still no objections could be taken thereon (vide **Gounder v State** [2020] FJCA 4; AAU 29 of 2015 (27 February 2020)].

[27] However, even assuming that the doctor's evidence on the identity of the appellant as narrated to him by the victim amounted to hearsay evidence and the prosecution had relied on the truth of it that alone will not vitiate the conviction. Excluding this evidence and possible non-direction there had been direct evidence of the victim and the confessional statement of the appellant to establish the identity and the charge against him. Regarding the above alleged hearsay evidence and possible non-direction of the trial judge to the assessors under the second ground of appeal the proper test for the appellate court is laid down in **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015) where this court would consider disregarding the impugned evidence and non-direction what a reasonable assessors would have done.

> *'[55] The approach that should be followed in deciding whether to apply the* ***proviso to section 23*** *(1) of the* Court of Appeal Act *was explained by the Court of Appeal in* ***R v. Haddy*** [1944] 1 KB 442. *The decision is authority for the proposition that* ***if the Court of Appeal is satisfied that on the whole of the facts and with a correct direction the only reasonable and proper verdict would be one of guilty there is no substantial miscarriage of justice****. This decision was based on section 4(1) of the Criminal Appeal Act 1907 (UK) which was in the same terms as section 23(1) of the* Court of Appeal Act.
>
> *[56] This test has been adopted and applied by the Court of Appeal in Fiji in* ***R –v- Ramswani Pillai*** *(unreported criminal appeal No. 11 of 1952; 25 August 1952);* ***R –v- Labalaba*** *(1946 – 1955) 4 FLR 28 and* ***Pillay –v- R*** *(1981) 27 FLR 202. In* ***Pillay –v- R*** *(supra) the Court considered the meaning of the expression "no substantial miscarriage of justice" and adopted the observations of North J in* ***R –v- Weir*** [1955] NZLR 711 *at page 713:*

> *"The meaning to be attributed to the words 'no substantial miscarriage of justice has occurred' is not in doubt.* ***If the Court comes to the conclusion that, on the whole of the facts, a reasonable jury, after being properly directed, would without doubt have convicted, then no substantial miscarriage of justice within the meaning of the proviso has occurred.****"*
>
> *[57] This will be so notwithstanding that the finding of guilt may have been due in some extent to the faulty direction given by the judge. In other words the misdirection may give rise to the conclusion that there has been a miscarriage of justice (ground 4 in section 23(1)) by virtue of the faulty direction but when considering whether to apply the proviso the appeal may be dismissed if the Court considers that there was no substantial miscarriage of justice.*
>
> *In* ***Vuki –v- The State*** *(unreported AAU 65 of 2005; 9 April 2009) this Court observed at paragraph 29:*
>
> *"The application of the* ***proviso to section 23*** *(1) _ _ _ of necessity, must be a very fact and circumstance – specific exercise."*

[28] Therefore, I hold that there is no real prospect of success of the second ground of appeal.

03rd ground of appeal

[29] The appellant joins issue with the trial judge's direction to the assessors at paragraph 30 of the summing-up that the doctor's finding of the anal injury on the victim would strengthen the credibility of his verbal evidence.

[30] The basis of this criticism is that what the victim had told the doctor cannot be treated as recent complaint evidence and therefore the trial judge's direction was wrong. However, there is nothing to even remotely suggest that the prosecution had relied on what the victim is supposed to have told the doctor as recent complaint evidence. It obviously cannot be treated as such given the delay in the complaint as far as the appellant is concerned. Therefore, the principles on recent complaint expressed in **Raj v State** [2014] FJSC 12; CAV0003 of 2014 (20 August 2014) are not applicable here.

[31] All what the trial judge had conveyed to the assessors is that the presence of the anal injury would merely go to the credibility of the victim's testimony. It has certainly corroborated the victim's allegation of anal penetration but not the identities of perpetrators.

[32] Therefore, there is no real prospect of success of the third ground of appeal.

04th ground of appeal

[33] The gist of the appellant's complaint under this ground of appeal is that the trial judge had not adequately directed the assessors on the cautioned interview of the appellant. The directions on the appellant's confessions are found at paragraphs 24, 38, 39 and 40. The appellant had given evidence at the trial where after a *voir dire* inquiry his cautioned interview had been admitted by the trial judge.

[34] In **Tuilagi v State** [2017] FJCA 116; AAU0090.2013 (14 September 2017) the Court of Appeal considered several previous decisions including **Maya v State** (supra) and stated:

> *'The correct law and appropriate direction on how the assessors should evaluate a* ***confession*** *could be summarised as follows.*
>
> *(i) The matter of admissibility of a confessional statement is a matter solely for the judge to decide upon a voir dire inquiry upon being satisfied beyond reasonable doubt of its voluntariness (vide* ***Volau v State*** *Criminal Appeal No.AAU0011 of 2013: 26 May 2017 [2017] FJCA 51).*
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> *(ii) Failing in the matter of the voir dire, the defence is entitled to canvass again the question of voluntariness and to call evidence relating to that issue at the trial but such evidence goes to the weight and value that the jury would attach to the* ***confession*** *(vide* ***Volau****).*
>
> *(iii) Once a* ***confession*** *is ruled as being voluntary by the trial Judge, whether the accused made it, it is true and sufficient for the conviction (i.e. the weight or probative value) are matters that should be left to the assessors to decide as questions of fact at the trial. In that assessment the jury should be directed to take into consideration all the circumstances surrounding the making of the* ***confession*** *including allegations of force, if those allegations were thought to be true to decide whether they should place any weight or value on it or what weight or value they would place on it. It is the duty of the trial judge to make this plain to them. (emphasis added) (vide* ***Volau*****).**
>
> *(iv) Even if the assessors are sure that the defendant said what the police attributed to him, they should nevertheless disregard the* ***confession*** *if they think that it may have been made involuntarily (vide* ***Noa Maya v. State*** *Criminal Petition No. CAV 009 of 2015: 23 October [2015 FJSC 30])*
>
> *(v) However,* ***Noa Maya*** *direction is required only in a situation where the trial Judge changes his mind in the course of the trial contrary to his original*

view about the voluntariness or he contemplates that there is a possibility that the confessional statement may not have been voluntary. If the trial Judge, having heard all the evidence, firmly remains of the view that the ***confession*** *is voluntary, Noa Maya direction is irrelevant and not required (vide* ***Volau*** *and* ***Lulu v. State*** *Criminal Appeal No. CAV 0035 of 2016: 21 July 2017 [2017] FJSC 19.'*

[35] I think the trial judge's direction at paragraph 39 is adequate compliance with what the law required of the trial judge even if involuntariness remained a live issue before the assessors. He had also addressed the assessors on the appellant's complaint that the police had not explained the questions properly to him, did not give the right to counsel and that the police pressured him to sign the cautioned statement. It does not appear from the summing-up or the judgment that the trial judge had changed his mind in the course of the trial contrary to his original view about the voluntariness or he had contemplated that there was a possibility that the confessional statement may not have been voluntary.

[36] Therefore, one cannot say that the summing-up is not balanced, fair and objective as highlighted in **Chand v State** [2017] FJCA 139; AAU 112 of 2013 (30 November 2017). There is no real prospect of success of this ground of appeal.

05th ground of appeal

[37] The appellant complains against the trial judge having used the sentence *'At the close of the prosecution case, a prima facie case was found against all accused'* at paragraph 23 of the summing-up.

[38] This type of complaints had been dealt with by this court before on more than one occasion. While highlighting that it would be most advisable and in fact necessary to avoid that or similar sentiments this court had not treated it alone as fatal to the conviction (see **Raqio v State** [2020] FJCA 6; AAU61 of 2015 (27 February 2020)].

[39] Therefore, there is no real prospect of success of this ground of appeal

06th ground of appeal *(sentence)*

[40] The appellant complains that the trial judge had committed a sentencing error by taking into account the fact that the victim was a child as an aggravating feature and enhanced the sentence on account of that as well when he had already picked 12 years as the starting point in the range of sentences of 10-16 years for juvenile rape cases.

[41] The appellant's complaint sounds more as an allegation of double counting than anything else.

[42] The trial judge in the sentencing order has guided himself according to **Raj v State** [2014] FJSC 12; CAV0003.2014 (20 August 2014) where the sentencing tariff for juvenile rape was set between 10-16 years of imprisonment (later in **Aitcheson v State** [2018] FJSC 29; CAV0012.2018 (2 November 2018) the sentencing tariff for juvenile rape was enhanced and fixed between 11 to 20 years).

[43] In **Senilolokula v State** [2018] FJSC 5; CAV0017.2017 (26 April 2018) the Supreme Court has raised a few concerns regarding selecting the 'starting point' in the two-tiered approach to sentencing in the face of criticisms of 'double counting' and question the appropriateness in identifying the exact amount by which the sentence is increased for each of the aggravating factors stating that it is too mechanistic an approach. The Supreme Court also stated that sentencing is an art, not a science, and doing it in that way the judge risks losing sight of the wood for the trees.

[44] The Supreme Court advanced this proposition in **Kumar v State** [2018] FJSC 30; CAV0017.2018 (2 November 2018) stating that if judges take as their starting point somewhere within the range, they will have factored into the exercise at least *some* of the aggravating features of the case. The ultimate sentence will then have reflected any *other* aggravating features of the case as well as the mitigating features. On the other hand, if judges take as their starting point the lower end of the range, they will not have factored into the exercise *any* of the aggravating factors, and they will then have to factor into the exercise *all* the aggravating features of the case as well as the mitigating features. The Supreme Court also said that the lower [end] of the tariff for the rape of children and juveniles is long and the many things which make these crimes so serious have already been built into the tariff and therefore judges should not treat

as aggravating factors those features of the case which will already have been reflected in the tariff itself. If they do, that would be another example of 'double-counting', which must, of course, be avoided."

[45] Some judges following **Koroivuki v State** [2013] FJCA 15; AAU0018 of 2010 (05 March 2013) pick the starting point from the lower or middle range of the tariff whereas other judges start with the lower end of the sentencing range as the starting point.

[46] This concern on double counting was echoed once again by the Supreme Court in **Nadan v State** [2019] FJSC 29; CAV0007.2019 (31 October 2019) and stated that the difficulty is that the appellate courts do not know whether all or any of the aggravating factors had already been taken into account when the trial judge selected as his starting point a term towards the middle of the tariff. If the judge did, he would have fallen into the trap of double-counting.

[47] I previously had the opportunity of examining a similar complaint in **Salayavi v State** [2020] FJCA 120; AAU0038 of 2017 (03 August 2020) where I stated:

> *'[30] ……Therefore, in view of the pronouncements of the Supreme Court in **Nadan** it will be a good practice, if not a requirement, in the future for the trial judges to set out the factors they have taken into account, if the starting point is fixed 'somewhere in the middle of the range' of the tariff. This would help prevent double counting in the sentencing process. In doing so, the guidelines in **Naikelekelevesi** and **Koroivuki** may provide useful tools to navigate the process of sentencing thereafter.'*

[48] The trial judge had not specifically indicated what factors he had considered in selecting the starting point at 12 years but set out the aggravating factors he had used to enhance the sentence and the second such feature is directly related to the victim being a child though it is still not clear what factors had been taken into account in picking the starting point at 12 years.

[49] In any event, it is the ultimate sentence that is of importance, rather than each step in the reasoning process leading to it. When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered (vide **Koroicakau v The State** [2006] FJSC 5; CAV0006U.2005S (4 May

2006). In determining whether the sentencing discretion has miscarried the appellate courts do not rely upon the same methodology used by the sentencing judge. The approach taken by them is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range (**Sharma v State** [2015] FJCA 178; AAU48.2011 (3 December 2015).

[50] The ultimate sentence of 14 years imposed on the appellant is within the sentencing tariff.

[51] Therefore, the appellant has failed to demonstrate a sentencing error having a real prospect of success under the sole ground of appeal against the sentence to deserve enlargement of time to appeal against sentence.

Prejudice to the respondent

[52] No prejudice had been pleaded by the respondent but given the fact that the offences had been allegedly committed in 2015 and 2016 any fresh litigation would cause prejudice to the then child victim.

Order

1. Enlargement of time to appeal against conviction is refused.
2. Enlargement of time to appeal against sentence is refused.

COURT OF APPEAL FIJI

Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL